

Staff Summary Report



Council Meeting Date: 12/04/2003

Agenda Item Number: _____

SUBJECT: Request approval of the Agreement Re: Conditional Assignment of Property from the Mill Avenue Merchants Association, Inc. to the City of Tempe.

DOCUMENT NAME: 20031204casv09 **MILL AVENUE MERCHANTS ASSOCIATION (0109-08)**

SUPPORTING DOCS: Yes.

COMMENTS: N/A

PREPARED BY: Ken Jones, Internal Auditor (350-8504)

REVIEWED BY: Marlene A. Pontrelli, City Attorney (350-8120)

LEGAL REVIEW BY: Marlene A. Pontrelli, City Attorney (350-8120)

FISCAL NOTE: The assignment of physical and intangible property from Mill Avenue Merchants Association, Inc. ("MAMA") to the City will enable the City to contract with the Downtown Tempe Community ("DTC") to produce future Festivals at no cost to the City. DTC has committed, contractually, to the payment of City services for those festivals.

RECOMMENDATION: Authorize the Mayor to execute the Agreement Re: Conditional Assignment of Property from the MAMA to the City of Tempe.

ADDITIONAL INFO: An agreement between the City and the DTC for production of the Festivals referenced in this agreement is being presented for adoption concurrently herewith.

AGREEMENT
RE: CONDITIONAL ASSIGNMENT OF PROPERTY
FROM THE MILL AVENUE MERCHANTS ASSOCIATION, INC (“MAMA”)
TO THE CITY OF TEMPE (“CITY”)
C2003_____

THIS AGREEMENT is entered into this _____ day of _____, 2003, between the CITY OF TEMPE, a municipal corporation of the State of Arizona, referred to hereafter as “**Tempe**” or the “**City**”, and the Mill Avenue Merchants Association, an Arizona non-profit corporation, referred to hereafter as “**MAMA**,” which are sometimes referred to collectively as the “**Parties**.”

RECITALS

WHEREAS, the Parties to this Agreement recognize that the Spring and Fall Festivals of the Arts (hereafter collectively “**Festivals**”) were created, produced, and promoted by MAMA for more than 35 years; and that MAMA participated in the production and promotion of events known as the Fantasy of Lights (“**FOL**”) and Fantasy on Ice (“**FOI**”); and that MAMA’s efforts have historically provided benefits to the City, its residents, and downtown Tempe merchants; and,

WHEREAS, the Parties intend to continue both the tradition of the Festivals, FOL, FOI, and their benefits; and,

WHEREAS, the Parties acknowledge that although MAMA desires to continue to produce and promote the Festivals, FOL, and FOI, the associated costs and liabilities, prohibit the successful continuation of these events solely by MAMA; and,

WHEREAS, MAMA is indebted to the City for its continuing support and longstanding relationship with MAMA; and,

WHEREAS, the City and DTC are jointly committed to continue to promote and produce the Festivals, FOL, and FOI, as provided in the AGREEMENT BETWEEN THE CITY OF TEMPE

AND THE DOWNTOWN TEMPE COMMUNITY REGARDING THE TEMPE FESTIVALS OF THE ARTS, THE FANTASY OF LIGHTS AND THE FANTASY ON ICE (C2003____), which is exhibited hereto and on which MAMA is relying for this Agreement; and,

WHEREAS, MAMA desires to satisfy and discharge all its obligations, including but not limited to its financial obligation to the City and others, including any obligation to produce or promote the Festivals, FOL, and FOI;

NOW THEREFORE, in consideration of the premises, the mutual obligations of the Parties hereto, and the RECITALS, which are incorporated in this Agreement and are not mere recitals, the receipt and sufficiency of which are acknowledged by the Parties, the Parties agree as follows:

1. MAMA is obligated to the City for the cost of contracted City services provided during past Festivals, totaling \$153,675.24, hereafter the "Obligation." These costs may include, but are not limited to, services provided by the Police, Fire, and Public Works Departments for such items and services as equipment rental, maintenance, trash removal, cleanup, labor and other costs.

2. In complete, full, and final discharge and satisfaction of the Obligation to the City and any and all other obligations of MAMA to the City, known or unknown, MAMA assigns certain property owned, controlled, or otherwise in the possession of MAMA, its agents, officers, directors, employees, and successors in interest, including but not limited to cash, deposits, equipment, furniture, fixtures, books, copyrights, patents, trademarks, Internet domains, goodwill, and other tangible and intangible assets, as set forth on Exhibit A hereto, which is incorporated herein by this reference as though fully set forth, subject to the following material conditions:

- a. The City accepts the property referenced on Exhibit A in its current condition.
- b. The City acknowledges that the public benefit to be gained by the assignment of the aforementioned property has a value at least as great as the Obligation.

3. Warranties of MAMA:

a. MAMA warrants that Exhibit A, attached hereto, contains the tangible and intangible personal property owned by MAMA.

b. MAMA warrants that Exhibit B, attached hereto, accurately reflects all cash balances on hand and on account through November 30, 2003.

c. MAMA warrants that Exhibit C, attached hereto, accurately reflects all pre-paid Festival booth rental fees, reserves, taxes, equipment rental, parking fees, catalog fees, electrical, or other charges, through November 30, 2003, for which MAMA may be liable if the Festivals, FOL, or FOI were not produced.

d. MAMA warrants that all known creditors, and the amounts currently owed to each, are listed in Exhibit D and MAMA shall pay such creditors, except creditors set forth in paragraph 3(c), listed in Exhibit D from current cash on account prior to the assignment of the property described on Exhibits A and B to the City.

e. MAMA warrants that it has paid all tax obligations, excepting Tempe Sales Tax collected in advance of upcoming Festivals, and that it has no known payroll arrears.

f. MAMA warrants that all known claims against MAMA or its agents, officers, directors, employees, and successors in interest are listed in Exhibit E.

4. From the BNC Bank account balances identified in Exhibit B, MAMA shall retain at the time of assignment \$50,000 (cash) to pay reasonable costs incurred to settle or defend against all claims, known or unknown, including claim(s) listed in Exhibit E, to purchase, extend, modify insurance coverage deemed necessary in MAMA's sole discretion to sufficiently indemnify MAMA and its agents, officers, directors, employees, and successors in interest against such claims; to pay creditors that are currently unknown or charges that arise after the date of this agreement; and to pay costs associated with or relating to its obligations, including but not limited to its obligations arising herein. Both Parties recognize that the account balances reflected in Exhibit B do not include financial activity

subsequent to November 30, 2003, and that all cash and cash equivalents received by MAMA prior to the conveyance of assets should be deposited in such accounts.

5. Upon settlement, withdrawal, lapse, judgment, or dismissal of known claims listed on Exhibit E, unknown claims and payments to creditors, any amount remaining of the \$50,000 shall be remitted to DTC, or its successor (if such successor is a 501(c)(6)) according to the Bylaws of MAMA, which require transfer to a non-profit 501(c)(6) corporation. At the time of the remittance to DTC, MAMA shall provide to the City an accounting of all expenditures from the \$50,000 balance. Also, at the time of final disposition of assets, MAMA shall assign to the City ownership of trade names and Internet domain names owned, controlled, or otherwise in the possession of MAMA, its agents, officers, directors, employees, and successors in interest, which were not included in the initial assignment of assets.

6. Unless specifically provided in the Agreement, the City shall not be responsible for, nor indemnify against, any claims made against MAMA or its agents, officers, directors, employees, and successors in interest.

7. Conditions of Assignment:

a. The City agrees to pay, satisfy, perform, discharge, and indemnify all of MAMA's obligations on Exhibit C by either (1) producing the Festivals, FOL, and FOI for which MAMA has collected pre-paid fees or deposits, from whatever source, whether on account or not; or, (2) refunding the pre-paid fees and deposits to the individuals or entities from whom or which the pre-paid fees and deposits were received.

b. The City and DTC shall execute the Agreement Between the City of Tempe and the Downtown Tempe Community Regarding the Tempe Festivals of the Arts, the Fantasy of Lights and the Fantasy on Ice, C2003_____, Exhibit F, contemporaneously with the execution of this Agreement.

c. The City shall include provisions in the AGREEMENT between the City and DTC, referred to in paragraph 7(b) and exhibited hereto, to perpetuate the tradition of the festivals and the community benefits provided by MAMA. Those provisions shall require that:

The DTC shall strive to produce and promote the Festivals in the same general format and maintain the quality of past Festivals. Any substantive changes and improvements to the Festivals shall be subject to the direction of the Festival Committee (the makeup of which is described later in this paragraph), the approval of the DTC Board of Directors, and the review of the City of Tempe, as provided for in this Agreement. The Parties acknowledge that the DTC has created and shall maintain, during the term of this Contract, a DTC standing board committee known as the "Festival Committee." The Festival Committee shall direct and recommend policy, as it relates to the production and promotion of the Festivals, to the DTC Board of Directors. The DTC has appointed Matt Hasher, a MAMA Board Member, as the Committee's first Chairperson, and member of the DTC Executive Committee, subject to DTC bylaws as they relate to the conduct, and attendance of Board Members and Committee Chairs. The DTC has also invited the members of the MAMA Board of Directors to serve on this committee, without term limitation, along with other DTC members that may want to participate. Additionally, the Parties acknowledge that two voting members and two advisory members of the MAMA Board of Directors are currently DTC voting Board Members and/or Officers. DTC shall also support and foster a Festival scholarship program, generally in accord with MAMA's scholarship program, to the extent sufficient funds are available from Festival income, and subject to the review of the Festival Committee. The DTC shall continue to conduct an independent jury process to

select artists for the Festivals that will perpetuate the reputation, goodwill and quality of the arts and crafts presented at the Festivals.

8. The City may inspect MAMA's books, records, and accounts and examine tangible personal property prior to the execution of this Agreement.

9. To the extent permitted by law, each party shall indemnify and hold harmless the other party, and its directors, officers, agents and employees, against and from all claims, demands, suits, losses, damages, expenses, and liabilities, including, without limitation, reasonable costs of defense, reasonable attorney's fees and reasonable witness fees, of any type arising in connection with a breach of this Agreement, by the other party or its directors, officers, agents, servants, employees, or subcontractors or persons employed by them.

10. Nothing herein contained in this Agreement shall ever be construed to create an association, joint venture, trust or partnership, or to impose a trust or partnership covenant, obligation or liability on or with regard to the parties. Neither party shall be under the control of or shall be deemed to control the other party. Neither party shall be the agent of or have a right or power to bind the other party without its express written consent, except as expressly provided in this Agreement.

11. No assignment or other transfer of this Agreement shall be binding or create any rights in any assignee until each assignment or other transfer is approved or accepted in writing by the other party.

12. In the event that any of the terms, covenants or conditions of this Agreement, or the application of any such term, covenant or condition, shall be held invalid as to any person or circumstance by any court having jurisdiction in the premises, all other terms, covenants or conditions of the Agreement and their application shall not be affected thereby, but shall remain in force and effect.

13. This Agreement constitutes the entire agreement between the parties, and no understandings or obligations not herein or therein expressly set forth shall be binding upon them. No

modification, amendment or alteration of this Agreement shall be valid unless it is in writing and signed by both parties.

14. This Agreement shall be construed and governed by the laws of the State of Arizona.

15. All notices herein provided for, and communication pursuant to this Agreement, shall be given by MAMA to Tempe in care of the City Manager, or his designee, 31 East 5th Street, Tempe, AZ 85281 and by Tempe to MAMA in care of Richardson & Silverman at 423 S. Mill Avenue, Tempe, AZ 85281.

16. The parties acknowledge that this Agreement is subject to cancellation by Tempe pursuant to A.R.S. § 38-511.

IN WITNESS WHEREOF, the parties hereto have set forth their hands in the City of Tempe,
Arizona, on the day and date first above written.

CITY OF TEMPE, a municipal corporation

By: _____
Neil G. Giuliano, Mayor

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk

MILL AVENUE MERCHANTS
ASSOCIATION

By: _____
Its: President, Lorraine Oglesby

And

By: _____
Its: Vice-President, Mike Jennings

EXHIBIT A

Tangible Personal Property
(As of November 30, 2003, listing attached)

Intangible Personal and Intellectual Property
(As of November 30, 2003, Trade name certifications attached)

Patents, copyrights, trademarks, and all associated goodwill, source codes, software, and related documentation, and chooses in action that are legally assignable.

EXHIBIT B

BNC National Bank Account Statements
(As of November 30, 2003, attached)

EXHIBIT C

Balance Sheet (November 30, 2003 attached)

Pre-paid Fees and Deposits from Artists, Vendors, and All Others (November, 30 2003 attached)

EXHIBIT D

Known Creditors

Name	Amount
Steptoe & Johnson for delinquent legal expenses	\$6,600.58
Old Towne Ventures, L.L.C. (landlord) for rent through end of term January 31, 2004	\$6,160.42
Richardson & Silverman for current and estimated future (reorganization, conditional assignment, and defense of claims, etc.)	\$5,000.00
Haas & Wilkerson, Inc. for business, commercial, general liability, volunteer accident, crime and non-owned hired auto coverage expenses	\$30,739.36
Anderson & Church & Co. for preparation of fiscal years 2003 & 2004 tax returns	\$1,400.00
Total	\$49,900.36

EXHIBIT E

Known Claims

Name	Amount
Gary Sanders (employment termination) – this claim is contingent and may include additional claims or legal theories of liability	unknown
Tatiana Orpinas – personal injury claim; claimed date of loss, March 28, 2003	\$50,000
Total	\$50,000

EXHIBIT F

AGREEMENT BETWEEN THE CITY OF TEMPE AND THE DOWNTOWN TEMPE COMMUNITY REGARDING THE TEMPE FESTIVALS OF THE ARTS, THE FANTASY OF LIGHTS AND THE FANTASY ON ICE

C2003-_____

This is an Agreement between the City of Tempe ("**Tempe**"), a municipal corporation organized under the laws of the State of Arizona, and the Downtown Tempe Community ("**DTC**"), a private, non-profit Arizona organization. The purposes of this Agreement are to place the DTC in charge of promoting, marketing, producing, managing and conducting the Tempe Fall Festival of the Arts, the Tempe Spring Festival of the Arts, (collectively the "**Festivals**"), the Fantasy of Lights ("**FOL**") and the Fantasy on Ice ("**FOI**"), (the Festivals, the FOL, and the FOI collectively referred to as the "**Events**"), Events owned by Tempe; to provide for the transfer from Tempe to DTC of certain assets needed to run the events, which assets were transferred to Tempe from the Mill Avenue Merchants Association ("**MAMA**"); and to make provisions for the DTC's operation, management and production of the Events.

WHEREAS, MAMA has provided the community and visitors with many years of producing and managing the Events;

WHEREAS, the parties to this Agreement are desirous of continuing the production and management of the Events; and

WHEREAS, the parties to this Agreement recognize that the annual Events provide a significant and positive economic impact on Tempe; and

WHEREAS, the parties are desirous of having the Events continue now that MAMA no longer will be responsible for or participate in the management or production of the Events; and

WHEREAS, Tempe as owner of the Events is desirous of having the DTC as the producer and manager of these Tempe Events;

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, the parties agree as follows:

1. Status of Parties

- A. Tempe, as owner of the Events, hereby grants to the DTC the right to be the Events producer and manager for the planning, development and

implementation of the Events with all of the rights and responsibilities thereof.

- B. The DTC agrees that Tempe is the owner of the Events, with all of the rights and responsibilities thereof, and that the DTC is the producer and manager of the Events.

2. Site Plan

Before each of the Events, the DTC shall submit a site plan showing the basic boundaries for the Events to be approved by Tempe. The City of Tempe Special Events Task Force may approve minor changes or additions to the event boundaries. Major boundary changes shall be approved by the City Manager or his designee.

3. Tempe's Responsibilities

Tempe will provide City services in support of the Events. Charges for these City Services shall be paid for out of Events revenues. See paragraph 9 A. 2 below. Tempe will transfer to the DTC the assets Tempe has received from MAMA for running the Events. These assets include such items as booths and cash deposits collected from vendors for the use of Events' booths. Tempe shall enforce DTC's commitments to MAMA, contained in paragraph 5.D herein, and, as set forth in paragraph 7.C of the Agreement Re: Conditional Assignment of Property From the Mill Avenue Merchants Association, Inc. ("MAMA"), to the City of Tempe ("CITY") C2003_____.

4. DTC's Responsibilities

The DTC shall produce and manage the Events. If Festivals are not held, DTC shall refund all vendor deposits.

5. Operational Management of the Events

- A. The DTC shall be responsible for operational details of the Events, including but not limited to, site preparation, Events labor and personnel, security plan, emergency medical plan, communications and logistical planning as they relate to conducting the Events. The DTC shall submit to Tempe a preliminary outline of the Events prior to the time of the Events. After the DTC has been responsible for production and management of the first FOL and FOI held after the execution of this Agreement, a review will be conducted by Tempe and the DTC of the viability and cost effectiveness of the FOL and FOI. The DTC, at its annual option thereafter during the term of this Agreement, may continue to produce and manage the FOL and FOI or the DTC may decide, with the approval and consent of Tempe, to terminate the operation of the FOL and/or the FOI. The DTC may utilize, if necessary, revenues from the Fall 2003 Festival of the Arts and/or the Spring 2004 Festival of the Arts, to cover its costs for the production and management of the FOL and the FOI events held after the execution of this Agreement.

- B. The DTC shall submit to Tempe its preliminary plans for the following Events details:
- (1) Venue, site plan and layout.
 - (2) Concessions.
 - (3) Events Staffing and Security Staffing to manage crowds.
 - (4) Public Safety Services (Emergency Medical Services, Law Enforcement).
 - (5) Sanitation and Refuse Services.
 - (6) Subcontracts and Events Insurance, including but not limited to, Liquor Liability (if necessary), Product Liability, General Liability and Excess Liability Insurance in amounts to be determined by Tempe.
 - (7) Transportation, parking (including any surcharges for Events parking) and shuttle.
 - (8) Utilities, Fencing (if necessary), Barricading.
 - (9) Events Regulations.
 - (10) Events Time Schedules and Agreement Work Schedules.
 - (11) A Lost Child(ren) Program and appropriate staffing and support for said program.
- C. Final Events details shall be submitted by the DTC for approval by Tempe in accordance with time frames and any other criteria established by Tempe and agreed to by the DTC.
- D. In its operational management of the Festivals, the DTC shall strive to produce and promote the Festivals in the same general format and maintain the quality of past Festivals. Any substantive changes and improvements to the Festivals shall be subject to the direction of the Festival Committee (the makeup of which is described later in this paragraph), the approval of the DTC Board of Directors, and the review of the City of Tempe, as provided for in this Agreement. The Parties acknowledge that the DTC has created and shall maintain, during the term of this Contract, a DTC standing board committee known as the "Festival Committee." The Festival Committee shall direct and recommend policy, as it relates to the production and promotion of the Festivals, to the DTC Board of Directors. The DTC has appointed Matt Hasher, a MAMA Board Member, as the Committee's first Chairperson, and member of the DTC Executive Committee, subject to DTC bylaws as they relate to the conduct, and attendance of Board Members and Committee Chairs. The DTC has also invited the members of the MAMA Board of Directors to serve on this committee, without term limitation, along with other DTC members that may want to participate. Additionally, the Parties acknowledge that two voting members and two advisory members of the MAMA Board of Directors are currently DTC voting Board Members and/or Officers. DTC shall also support and foster a Festival scholarship program, generally in accord with MAMA's scholarship program, to the extent sufficient funds are available from Festival income, and subject to the review of the Festival Committee. The DTC shall continue to conduct an independent jury process to select artists for the

Festivals that will perpetuate the reputation, goodwill and quality of the arts and crafts presented at the Festivals.

6. Sponsorships, Promotion, Publicity, Marketing, Advertising, Signage

- A. The DTC shall be responsible for preparing annually a Sales and Marketing Plan to present to Tempe for sponsorships, promotion, publicity, marketing, advertising and signage. Tempe will have final approval of the Sales and Marketing Plan which approval shall not be unreasonably withheld.
- B. Tempe hereby agrees and grants to the DTC the right to be the sole sales and marketing organization for the Events including, but not limited to, sponsorships, promotion, publicity, marketing, advertising and signage. This grant is conditioned upon the recognition in such activities of Tempe as owner of the Event.
- C. Merchandising and sale of Events related products at the Events on public right of ways and public property shall be reserved to the DTC. Outdoor vending of products on private property at the Event, the vending plan, location and scope is subject to applicable Tempe permit and vending requirements and must be approved by Tempe and the DTC. Any vending plan must provide for reasonable accommodation and opportunities for Tempe businesses within the Events boundaries and in the immediate vicinity.
- D. Tempe will have final approval of all collateral materials, including but not limited to: press releases, posters, flyers, media alerts, sponsorship agreements and similar items. All promotional materials must promote the City of Tempe as owner of the Events.

7. Event Revenues and Expenditures

- A. Tempe and the DTC shall adopt an Events budget annually based on the income/expense projections and plans submitted pursuant to paragraphs 4, 5 and 6 above, which budget may be amended from time to time by Tempe and the DTC. The DTC will establish an “Events Account” (“Account”) as a special fund to carry out the purposes of this Agreement. The DTC shall be empowered to authorize and approve all Events expenses paid from this Account, subject to review by Tempe. Events income (“Income”) and expenses (“Expense”) shall ultimately be determined by Tempe and the DTC. Events Expenses include, but are not limited to, Expenses identified as such in the budget and expenses documented pursuant to paragraphs 8 and 9. All Events Income shall be deposited into the Account.
- B. The DTC will serve as fiscal agent and will provide accounting, financial reporting and auditing services for the Events to Tempe. Tempe shall have the right, upon reasonable prior written notice, to examine the financial records and books directly relating to the Events. Tempe shall also have the right to examine the financial records of the DTC’s subcontractors involved in the Events.

8. Expenses in Excess of Budget and/or Revenue Insufficient to Pay for Current City Services

If expenses for the Events exceed the budget as described in this Agreement and/or if revenues from the Events are insufficient to pay for the provisions of current City Events services, then Tempe and the DTC shall meet in good faith to determine how to amicably resolve these financial issues. If there is no resolution of these issues, either Tempe or the DTC may terminate this Agreement pursuant to the provisions of paragraph 10. L set out below.

9. Division of Revenues

- A. Revenues from the Events shall be applied in the following order:
 - (1) Direct costs of the Events, including sales taxes collected on behalf of Tempe.
 - (2) Current City service charges.
 - (3) DTC overhead including management and staff payroll.
 - (4) Establishment of a reserve fund equal to ten percent (10%) of annual Events revenues.
 - (5) All net excess revenues shall be applied to downtown marketing and promotional activities and other downtown enhanced municipal services. The DTC shall provide an exact accounting annually to the City Manager or his designee of all net proceeds distributed.
- B. Events Income shall include admissions, sponsorship revenue, net revenue from events concessions vending and merchandise and advertising.
- C. Events Expenses shall include all amounts to operate the events as approved in the Events Budget as mutually agreed to by Tempe and the DTC.

10. Other Terms and Conditions

- A. Compliance With Laws. The DTC agrees to conduct and execute this Agreement and the Events in compliance with all applicable local, state and federal laws and in compliance with all laws which are applicable to Tempe and the DTC with regard to these Events.
- B. City Permits, Licenses, Taxes, Outdoor Events Regulations. The DTC shall comply with and ensure compliance with the Tempe City Code and other regulations governing outdoor events, permits, licenses, payment of taxes and other applicable ordinances and regulations. The DTC shall maintain in current status all federal, state, county and city licenses and permits required for the

operation of the Events and the business conducted by the DTC as applicable to this Agreement.

- C. Independent Contractor Relationships. Except as may be otherwise set forth herein, no party to this Agreement shall have any responsibility whatsoever with respect to services provided or contractual obligations assumed by the other party.
- (1) The DTC, its subcontractors, employees, agents or representatives, in the performance of all work, services and activities under this Agreement or any subcontract, are independent, and not an employee, agent or servant of Tempe. The DTC's relationship and the relationship of its employees to Tempe shall be that of an independent contractor and not as employees or agents.
 - (2) Tempe employees, agents or representatives, in the performance of all work, services and activities under this Agreement, are considered at all times to be employees of the Tempe, and not employees, agents or servants of the DTC.
- D. Insurance and Indemnification. The DTC shall indemnify, defend and save harmless Tempe, its employees, officers and directors, from any and all alleged claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description which may arise out of this Agreement, the performance of its terms and conditions, or failure to comply with the Agreement (including any attorney's fees or litigation expenses), which may be brought or made against or incurred by Tempe, its employees, officers and directors, including loss of or damage to any property or for injuries to or death of any person caused by, arising out of, or contributed to, in whole or in part, by reason of any act, omission, professional error, or other conduct of the DTC, its volunteers, agents or representatives. The DTC's obligation under this subparagraph does not extend to any liability ultimately determined by law or judicial order to have been caused by the negligence or willful misconduct of Tempe, or its employees, officers and directors. The DTC shall require any subcontractor to indemnify and defend Tempe, its employees, officers and directors, by inserting indemnity language substantially similar to this subparagraph, in any subcontract agreement or arrangement the DTC enters into related to these Events.
- E. The DTC shall provide insurance, evidenced by certificate issued to Tempe, for such amounts and coverages as are satisfactory and approved by Tempe, with minimum amounts and coverages as specified by the City Manager or his authorized representative, naming Tempe, its employees, officers and directors, as additional insureds, to protect against loss arising out of this Agreement and the performance thereof. Events insurance obtained by the DTC covering all the parties shall be included as an Expense.
- F. Symbols, Trademarks, Copyrights, Broadcast and Media Rights. Tempe may authorize in writing a temporary non-exclusive license for use of any applicable

trade name, trademark, symbol, insignia or emblem in advertising, promotion, signage, broadcast or other uses. All broadcast and media rights are reserved to Tempe. This Agreement does not authorize the broadcasting, telecasting or transmission by wire or otherwise of any portion of the Events without the written permission of Tempe and the DTC.

- G. Subcontracts. The DTC shall be responsible for negotiating, executing and causing the performance of any subcontracts related to its responsibilities for the Events or as needed to carry out the responsibilities as defined in this Agreement. All subcontracts shall comply with federal, state and city laws and regulations which are applicable to the services covered by the subcontract and shall include all terms and conditions set forth herein which shall apply with equal force to the subcontract as if the subcontractor were the contractor referred to herein. The DTC shall be responsible for obtaining a surety bond from all subcontractors. The DTC is responsible for contract performance whether or not subcontractors are used.
- H. Audit and Records. Tempe may, at reasonable times and places, audit the books and records of any party to this Agreement, or any subcontractor, as related to this Agreement or the Events. Each party shall preserve and make available for inspection and audit by any other party all financial records, supporting documents, statistical records and any other documents pertinent to this Agreement for a period of three (3) years after the termination of this Agreement. This provision shall survive the termination of this Agreement. Upon termination of this Agreement, all materials and records produced by the DTC pursuant to this Agreement for the Events, and a final reconciliation of the Account, accompanied by documentation of all expenditures therefrom and return of any sums unexpended or unencumbered and remaining in the Account, shall be divided between Tempe and the DTC as provided in paragraph 9.
- I. Time of Essence. The parties agree that time shall be of the essence in this Agreement and the representations and warranties made are all material and of the essence of this Agreement.
- J. Right to Assurance. Whenever a party to this Agreement in good faith has reason to question another party's intent to perform, the party may demand that the other party give a written assurance of its intent to perform. In the event that a demand is made and no written assurance is given within five (5) days, the demanding party may treat this failure as an anticipatory repudiation or default of the Agreement.
- K. Term. The term of this Agreement ("Term") for purposes of the Festivals shall be for five (5) consecutive years beginning with the Fall, 2003 Festival of the Arts, unless sooner terminated by mutual agreement of the parties. The term of this Agreement for purposes of the FOL and FOI shall be for one year from the date of this Agreement, during which time the parties will review the viability of the DTC managing the FOL and FOI and determine if this Agreement as to the

Events shall be continued, and if so, under what other and/or additional conditions and provisions, if any.

- L. Termination, Cancellation, Dispute Resolution. This Agreement may be cancelled by a party for an event of default committed by another party as provided in paragraph 11 below. In the event of cancellation or termination prior to the end of the term, each party is entitled to receipt or return of sums owing as of the effective date of termination. The parties acknowledge that this Agreement is subject to cancellation by Tempe pursuant to A.R.S. § 38-511. If the parties are unable through mutual good faith efforts to amicably resolve any disputes which may arise out of the provisions of this Agreement or out of the execution of the duties and responsibilities described in this Agreement, then the parties, without waiver of any of their legal and equitable remedies, may agree to mediate such disputes using mutually agreeable procedures to do so.

11. Cancellation for Default

- A. This Agreement is critical to Tempe and Tempe reserves the right to cancel the whole or any part of this Agreement in the event of default by the DTC. This Agreement is also important to the DTC which reserves the right to cancel the whole or any part of this Agreement in the event of default by Tempe.
- B. An “Event of Default” by the DTC shall be for acting or failing to act as follows, or for materially breaching any promise or covenant made herein, including:
- (1) Failing materially to adequately perform the services set forth in the Agreement.
 - (2) Failing to complete the work required or furnish the materials required within the time stipulated in the Agreement or as agreed to.
 - (3) Failing to make progress in the performance of the Agreement and/or giving Tempe reason to believe that DTC will not or cannot perform to the requirements of the Agreement.
 - (4) Failure by the DTC to pay any sums when due hereunder or materially breaching any promise or covenant made herein.
- C. An “Event of Default” by Tempe shall be for acting or failing to act as follows, or for materially breaching any promise or covenant made herein, including:
- (1) Failing materially to adequately perform the services set forth in the Agreement.
 - (2) Failure by Tempe to pay any sums when due hereunder or materially breaching any promise or covenant made herein.

- D. A party wishing to cancel for an Event of Default shall deliver a written notice of default effective at once and not deferred by any interval of time, which notice shall provide the defaulting party ten (10) days from the date of delivery of the notice to the defaulting party to cure the breach or default unless a shorter time is specified herein. Upon a failure by the defaulting party to cure within such time period, the party canceling for default shall deliver a notice of cancellation to all parties which is effective immediately and not deferred by any interval of time unless otherwise stated by the canceling party.
- E. The parties may resort to any single or combination of the following remedies in the Event of Default:
 - a. Cancel any contract,
 - b. Reserve all rights or claims to damages for breach of any covenants of the Agreement;
 - c. In case of default, Tempe or the DTC reserve the right to purchase materials, or to complete the required work in accordance with the needs of Tempe or the DTC.

12. Spirit of Support

Tempe and the DTC agree to provide cooperation and proactive support of all mutually agreed upon actions and decisions, helping to assure timely response and productive solutions for the Events.

13. Warranties

The DTC shall insert the following language, or language substantially similar, in any subcontract for the Events: “The subcontractor warrants that all material, service or construction delivered under the contract shall conform to the requirements of the contract and this Agreement and shall be free from defects in material, workmanship and design and will be fit for the intended purposes. Mere acceptance of the material, service or construction specified and any inspection incidental thereto by Tempe or the DTC shall not alter or affect the obligations of the subcontractor or the rights of Tempe or the DTC under the foregoing warranties”.

14. No Waiver

No waiver of any provision in this Agreement shall be effective unless it is in writing signed by the party against whom it is asserted. Any such written waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing or future waiver.

15. Jurisdiction, Venue and Governing Law

All parties hereby irrevocably submit to the jurisdiction of the Arizona state or federal courts in any action or proceeding arising out of or relating to this Agreement and hereby irrevocably agree that all claims in respect to such action or proceeding may be heard and determined in

Maricopa County, Arizona, the venue situs. The parties agree that this Agreement shall be construed and interpreted according to the laws of the State of Arizona.

16. No Assignment or Transfer

This Agreement, or any interest herein, shall not be assigned, transferred or otherwise encumbered under any circumstance by the DTC without the prior written consent of Tempe.

17. Succession

This Agreement and the rights and obligations contained herein shall inure to the benefit of and be binding upon the parties hereto and their respective successors and lawful assigns.

18. Survival

Any rights either party may have in the event it terminates this Agreement pursuant to the terms hereof shall survive such termination.

19. Authorization to Enter Agreement

By execution of this Agreement and the signatures shown below, each party certifies that the person executing this Agreement on its behalf is fully authorized to act on its behalf and bind the party as to all matters contained in this Agreement.

20. Entire Agreement

This Agreement incorporates and includes all prior negotiations and understandings applicable to the matters contained herein. The parties agree that this Agreement constitutes the entire understanding and agreement between the parties and supersedes previous agreements and representations whether written or oral.

21. Joint Preparation

The preparation of this Agreement has been a joint effort of the parties, and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one or more of the parties than the other.

22. Amendments in Writing

This Agreement may not be changed, altered or modified except by an instrument in writing signed by all parties.

23. Provisions Severable

In the event any term or provision of this Agreement shall be determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning or be construed or deleted as such authority determines, and the remainder of this Agreement shall be construed to be in full force and effect.

24. Captions and Paragraph Headings

Captions and paragraph headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement, nor the intent of any provisions hereof.

25. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which shall constitute one and the same Agreement.

26. Notices

Whenever any party desires to give notice to another party, it must be given by written notice, mailed by first class mail, addressed to the party at the address shown in this Agreement and shall be effective when received.

Notice for the DTC:

DTC
520 S. Mill
Tempe, AZ 85281

Notice for Tempe:

City Attorney
P.O. Box 5002
Tempe, AZ 85280

With copies to:

MAMA
c/o Richardson & Silverman
423 S. Mill Ave.
Tempe, AZ 85281

With copies to:

MAMA
c/o Richardson & Silverman
423 S. Mill Ave.
Tempe, AZ 85281

City Manager
P.O. Box 5002
Tempe, AZ 85280

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective _____, as shown by the signatures below.

CITY OF TEMPE, a municipal corporation

Neil G. Giuliano, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

The Downtown Tempe Community

By: _____
Its: _____